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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 356

THE HENRY HANGER AND DISPLAY FIXTURE CORP. OF AMERICA, AND THE HENRY HANGER AND DISPLAY FIXTURE CORP. OF FLORIDA, *Petitioners*,

v.

SEL-O-RAK CORPORATION, *Respondent*.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

(Filed September 13, 1956)

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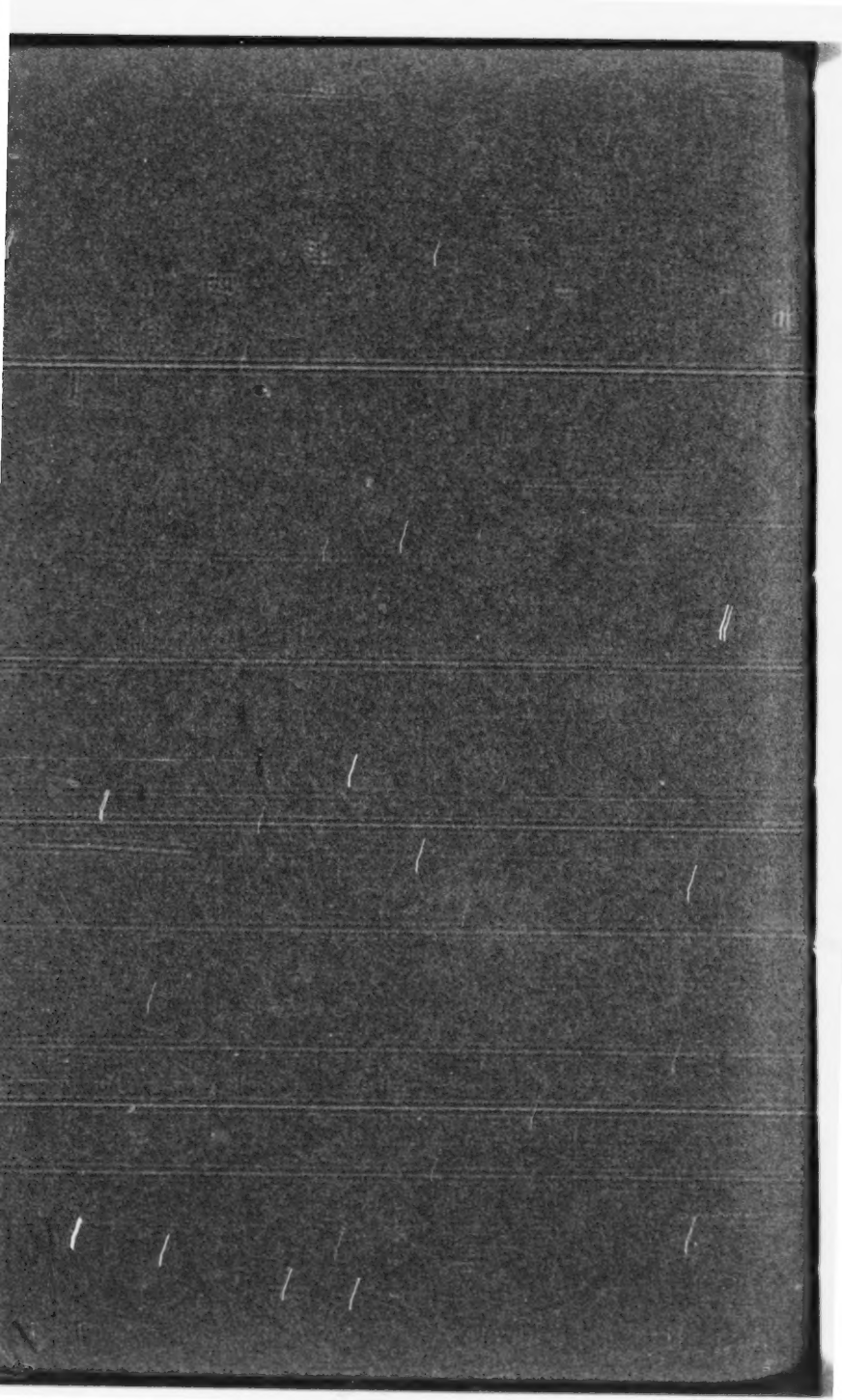

INDEX

Page

The Petitioners' Statement of the Case Is Not Complete 2

There Are No Valid Reasons for Granting the Writ .. 4

The Decision of the Fifth Circuit Court of Appeals Is Not in Conflict With Supreme Court Decisions .. 6

The Decision of the Fifth Circuit Court of Appeals Is Not in Conflict With Other Circuit Court Decisions 13

This Is Not a Case in Which a Court of Appeals Has Rendered a Decision on Important Questions of Federal Law Which May Not Have Been But Should Be Settled by This Court 16

Conclusions 18

AUTHORITIES CITED

Cases

Ashley v. Weeks Newman, 220 F. 899 (CCA 2) 12

Boyle v. Rousso, 16 F. 2d 666 (CCA 8) 12, 15

Diamond Rubber Co. v. Consolidated Rubber Co., 220 U. S. 428 12

Dobson v. Dornan, 118 U. S. 10 6

Forestek Plating & Mfg. Co. v. Knapp Monarch, 106 F. 2d 554 (CCA 6) 13

Franklin Knitting Mills v. Gropper Knitting Mills, 15 F. 2d 375, cert. den., 273 U. S. 61 (CCA 2) 12, 13

Glade v. Walgreen Co., 122 F. 2d 306, cert. den. 314 U. S. 692 15

Gorham Mfg. Co. v. White, 81 U. S. 511 .....6, 12, 18

Great A & P Tea Co. case, 340 U. S. 147 ..... 6, 7

Hopkins v. Waco Products, Inc., 205 F. 2d 221 (CCA 8) 13, 14

Hotchkiss v. Greenwood, 52 U. S. 248 (1850) 17

King Ventilating Co. v. St. James Ventilating Co. et al., 26 F. 2d 357 .....13, 14

Krementz v. Cottle, 148 U. S. 556 12

Page

Loom Co. v. Higgins, 105 U. S. 580 12
Ottuna Box Carloader Co. v. Cristy Box Carloader Co., 215 F. 362 (CCA 8) 15
Pelouse Scale Mfg. Co. v. American Cutlery Co., 102 F. 916 (CCA 7) 15
Sel-O-Rak Corp. v. Henry Hanger & Display Fixture Corp. et al., 232 F. 2d 176 (CCA 5) 2
Smith v. Mid-Continent Inv. Co., 106 F. 2d 622 (CCA 8) 15
Smith v. Whitman Saddle Co., 148 U. S. 674 .....6, 8, 9, 12
Standard Match Corp. v. Bell Machine Co., 83 F. 2d 365 (CCA 7) 15
The Barbed Wire Patent, 143 U. S. 275 12
Williams Mfg. Co. v. United Shoe Machinery Corp., 316 U. S. 364 9

STATUTES

35 USC 102 16
35 USC 103 .....16, 17
35 USC 171 .....12, 13, 16
35 USC 282 10

RULE

Supreme Court of the United States—Rule 19 1(b) ... 13

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No. 256

THE HENRY HANGER AND DISPLAY FIXTURE CORP. OF AMERICA, AND THE HENRY HANGER AND DISPLAY FIXTURE CORP. OF FLORIDA, *Petitioners*,

v.

SEL-O-RAK CORPORATION, *Respondent*.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

This is a patent case and involves not ony deliberate and wilful infringement of Respondent's patent, but unfair competition including reprehensibe and unethical conduct and piracy and appropriation of the claim of ownership of Respondent's patented design by Petitioners. The facts are not in question. The points of law are simple, clear cut and have been interpreted many times over by this Court.

THE PETITIONERS' STATEMENT OF THE CASE IS NOT COMPLETE

Petitioners' statement of the case is conspicuously devoid of facts and findings unfavorable to the Petitioners.

To illustrate the omission by Petitioners of the facts that led to the initiation of the case at bar, reference is made to the decision below in *Sel-O-Rak Corporation* v. *The Henry Hanger and Display Fixture Corporation of America, et al*, 232 F. 2d 176 (Reprinted in Petitioners' appendix pages 23A-33A), where Judge Tuttle, summarizing the facts found by the Master at trial said (Pet. p. 26A, 28A):

> "Other relevant facts that stand undisputed in the record are: When Appellant obtained its patent by assignment, it furnished Appellees with a rack to find purchasers for Appellant. Appellees then copied the rack, manufactured it and advertised and sold it to the trade in advertising clearly calculated to claim for Appellees the research and inventve skill which they now assert did not exist in the true inventor.
>
> . . . After having used a trouser rack of their own design as leaders in the field for 20 years, the defendants immediately upon seeing the article designed and manufactured by appellant, appropriated it and advertised it to the trade as 'revolutionary in concept,' and as having been 'designed for you, after months of reseach'."

The Fifth Circuit Court of Appeals after carefully considering the lengthy report of the Special Master; after hearing argument by Petitioners and Respondent; after personally observing and examining respondents' patented rack and a life-size photographic

reproduction of the principal prior art claimed as anticipation; and with voluminous briefs, records, and exhibits before them, found the patent in suit valid, stating (Pet. p. 27A):

> ". . . The question is whether the end result is a design for an article of manufacture (1) achieved as a result of inventive skill as contrasted with the natural aptitude of a skilled artisan, (2) is new, (3) and original, (4) and ornamental.
>
> "We conclude that the design here meets all of these requirements and that the patent is valid."

The facts as to unfair competition are undisputed in the Record. The Master found (Pet. p. 16A), "The plaintiff (Respondent) claims and contends with merit that the defendants (Petitioners) copied, imitated, sold and distributed plaintiff's (Respondent's) patented pants hanger as their own production and creation." The Master was so strongly impressed with the equities of this case being in favor of the Plaintiff (Respondent), and with the unfair competition by the Defendants (Petitioners), that he recommended that if it were within his power the costs would be assessed against the Defendants (Petitioners); but because the Master held for the Defendants (Petitioners) on validity, he suggested that the costs be assessed against the Plaintiff (Respondent). (See Pet. p. 18A)

The District Court being impressed by the findings of the Special Master with respect to the facts of unfair competiton and the piratical acts and conduct of the Defendants (Petitioners) did not adopt the suggestion that the total costs be assessed against the Plaintiff (Respondent) but, in part, adopted the recommendation that costs be assessed against the

Defendants (Petitioners) by ruling that the costs be shared between the parties.

The only reason that the Special Master and later the District Court did not find the defendants (Petitioners) guilty of unfair competition was because of the finding that the patent in suit was invalid. However, after careful consideration the Fifth Circuit Court of Appeals reversed the District Court and said (Pet. p. 33A):

> "Finding, as we do, that the design here was inventive, new, original and ornamental, and there being no factual issues which give rise to a presumption of correctness of the contrary conclusions of the trial court, we hold that the judgment must be reversed and the case remanded for further and not inconsistent proceedings."

It is clear that by this action the Court of Appeals intended that the District Court consider the unfair competition by the defendants (Petitioners) in further proceedings before the District Court.

THERE ARE NO VALID REASONS FOR GRANTING THE WRIT

The unhappy petitioners faced with the prospect of accounting for their "unethical and reprehensible" conduct (R. 56), have petitioned for a Writ of Certiorari on the basis that the Supreme Court review questions of undisputable fact and questions of law already interpreted by this Court and followed by the lower courts.

The petitioners' questions may be stated in a single question: Did the Fifth Circuit Court of Appeals err in finding the patent valid?

The District Court below merely affirmed the Master's report without rendering a written opinion or setting forth findings of fact and conclusions of law. Petitioners loudly proclaim the thoroughness and completeness of the Master's report in deciding for them. However, petitioners fail to bring to this Court's attention the Master's lack of conviction in his own findings on the question of validity evidenced when he stated in his report to the District Court (Rec. 48):

> "I realize and so state in view of the next finding (on the question of validity) that the above findings (infringement and piratical acts of Defendants-Petitioners) are irrelevant and immaterial but they have been made because the Special Master realizes that he may be reversed on the next findings."

The Master was in fact reversed by the Fifth Circuit Court of Appeals in a complete and comprehensive opinion.

The Petitioners now assert that the decision rendered by the Fifth Circuit Court affects important questions of Federal law. However, this is a simple case involving patent infringement and private litigants in a very limited field, and includes no questions deserving the dignity of review by this Court.

THE DECISION OF THE FIFTH CIRCUIT COURT OF APPEALS IS NOT IN CONFLICT WITH SUPREME COURT DECISIONS

I.

Petitioners, attempting to parallel the facts of this case with the facts of the *Great A & P Tea Company* case, 340 U.S. 147, and the *Smith* v. *Whitman Saddle Company* case, 148 U.S. 674, repeatedly disregard the basic concepts set forth by this Court for determining the conditions of patentability in designs.

Petitioners improperly insist on separating the design into its component elements; then, by culling from the prior art, elements of the combination in suit, attempt to show that the design is not new.

In *Gorham* v. *White*, 81 U.S. 511, and *Dobson* v. *Dornan*, 118 U.S. 10, this Court established the foundation of design patent law. These cases held that, in determining validity of design patents, the design cannot be separated into its component parts as petitioners repeatedly suggest, but must be viewed as a whole as to *appearance*.

In *Gorham* v. *White*, supra, this Court stated:

> "It is the appearance itself which attracts attention and calls out favor or dislike. It is the appearance itself, therefore, no matter by what agency cause, that constitutes mainly, if not entirely, the contribution to the public which the law deems worthy of recompense."

In *Dobson* v. *Dornan*, supra, this Court further stated:

> "Undoubtedly the claim in this case covers the design as a whole and not any part and it is to be tested as a whole as to novelty an invention."

The Court below, in determining the question of validity, followed the law of this Court when they said, (Pet. p. 30A):

> ". . .The design must be considered by the impression it produces as a whole."

The Court further stated, (Pet. p. 27A):

> "In our consideration of the basic question as to the validity of the patent, we start with the knowledge that every design must of necessity embody something old and known. Design being only a rearrangement of line and form, it must always depend upon elements that in a strict sense are old. We are not impressed, therefore, with appellees attack on the design patent here on the ground that it combined known components. The straight line, the square, the circle, the cube, triangle and sphere are all known components. They are all old. But any design patent, it seems to us, must of necessity combine some of these elements."

II.

Petitioners' assertion that the *Great A & P Tea Company* case, supra, is controlling in this case is misleading. There is no connection or similarity between the two cases.

The issues in the *Great A & P Tea Company* case was the construction of the claims. As stated by Justice Jackson:

> "Since the courts below perceived invention only in the extension of the counter, we must first determine whether they were right in so doing . . . In the first place the extension is not mentioned in the claims except by a construction too strained to be consistent with the clarity required of claims

> which define the boundaries of a patent monopoly . . . In the second place, were we to treat the extension as adequately disclosed, it would not amount to an invention. We need not go so far as to say that invention never can reside in mere change in dimensions of an old device, but certainly it cannot in mere elongation of a merchant's counter, a contrivance which, time out of mind, has been of whatever length suited the merchant's needs . . . In the third place, if the extension itself were conceded to be a patentable improvement of the counter, and the claims were construed to include it, the patent would nevertheless be invalid by overclaiming the invention by including old elements, unless, together with its other old elements, the extension made up a new combination patentable as such."

The issue in the present case was the determination of the presence of ornamentation, originality, novelty and invention in the design.

III.

In the *Smith* v. *Whitman Saddle Company*, case, supra, the Supreme Court held that the difference between the patented device and the alleged infringing device was sufficient to avoid infringement. The lower court's finding, that the design patent was valid, was not disturbed by this Court. Petitioners, by quoting out of context, (page 10 of the Petition) have given a meaning to the language of the Supreme Court that never was intended. In fact, the first half of the quotation, attributed to the *Smith* v. *Whitman Saddle Company* case, was not even made by the Supreme Court but by a District Court Judge in a case involving a cheese safe.

The second half of this question was taken out of context from the following:

> ". . . a person cannot be permitted to select an existing form, and simply put it to a new use anymore than he can be permitted to take a patent for the mere double use of a machine. If, however, the selection and adaptation of an existing form is more than the exercise of the imitative faculty, and the result is in effect a new creation, the design may be patentable."

Again on page 19 of the Petition, petitioners attribute another statement to the Supreme Court in the *Smith* v. *Whitman Saddle Company*, case that was actually made by the District Court Judge in the case involving the cheese safe.

Using the same tack, petitioners, on page 12, line 17, again quote out of context in such manner as to completely reverse the intended meaning of the Court below. The complete quotation is, (Pet. p. 30A):

> ". . . This undisputed evidence of newness and originality of the *design* is not rebutted by the fact that the separate elements of a drum of different proportions of a tripod of unspecified proportions or period, and of a cylindrical support for the upper drum were not new." (emphasis supplied by the Court)

See also *Williams Mfg. Co.* v. *United Shoe Machinery Corporation*, (1942) 316 U.S. 364.

Had Petitioners, as they suggest in the first full paragraph on page 20 of the Petition, in their actual manufacture and sale, combined the prior art by placing Petitioners' old rack on top of a Duncan Phyfe leg, this litigaton would never have been instituted.

But, Petitioners did not follow the prior art as was their right. Instead, in a calculated, wilful and deliberate manner, and with unethical and reprehensible conduct, they appropriated respondent's patented design. Their subsequent defense that the patent was invalid could not be maintained and should not now be reviewed by this Court.

Petitioners, embarrassed by their wholehearted praise of Respondent's invention, and their exact imitation and appropriation of Respondent's design, and their unfair competition, and being unable to mitigate the import of their "reprehensible and unethical conduct", now question the discretion of the Fifth Circuit Court of Appeals in making reference to these undisputed facts.

Petitioners allege that aside from the advertising by Petitioners, which praises the patented design, and aside from the fact that Petitioners abandoned their own old designs and appropriated Respondent's new design, there was "no other proof of record relied upon by the Circuit Court for its determination that invention was present in Respondent's design".

It would appear that the Petitioners are attempting to place the burden of showing validity on the Respondent when, in reality, the burden of showing invalidity weighs heavily on the Petitioners as set forth in 35 U.S.C. Section 282.

In this case, there are no facts to show or prove the patent to be invalid. The only witness relied upon by the petitioners in the attempt to prove invalidity was an expert in the field who testified when comparing the patented rack with the principal prior art: (R. 299)

> "I mean there is no similarity. It is completely different. Other than the fact it is circular there is no similarity there."

The Fifth Circuit Court, after a careful review of the record, realized the lack of proof presented to substantiate the defense of invalidity; and stated (Pet. p. 33A):

> "Finding, as we do, that the design here was inventive, new, original and ornamental, and there being no factual issues which give rise to a presumption of correctness to the contrary conclusions of the trial court, we hold that the judgment must be reversed . . ."

In the absence of any factual issues to show invalidity, the court below was following accepted judicial thinking in making reference to the activities of the Petitioners in advertising and imitating the patented design. As stated by Judge Tuttle (Pet. p. 28A):

> "It is of utmost significance here that the appellees themselves considered the design patent possessed of elements that were not 'obvious at the time the invention was made to a person having ordinary skill in the art'. After having used a trouser rack of their design as leaders in the field for 20 years, the defendants immediately, upon seeing the article designed and manufactured by the appellant, appropriated it and advertised it to the trade as 'revolutionary in concept', and as having been 'designed for you, after months of research'.
>
> "Recognizing, as we do, that the validity of a patent is tested by consideration of the statutory purpose as it affects the public as a whole rather than on the basis of the rights or interests of only

> parties to specific litigation, we are nevertheless impressed by the recognition thus given to the essential contentions of the inventor by one who had vital commercial interest at stake, and whose attitude may be considered as fairly representing the industry."

See *Krementz* v. *Cottle*, 148 U.S. 556; *Diamond Rubber Co.* v. *Consolidated Rubber Co.*, 220 U.S. 428; *The Barbed Wire Patent*, 143 U.S. 275; *Loom Co.* v. *Higgins*, 105 U.S. 580.

IV.

Petitioners have gone far afield when they seek to have this Court review this case on certiorari because of the alleged unreal factual issue that functional features are present in Respondent's design and on the further allegation that the design is obscured during use.

Statute 35 USC 171 requires that a design to be patentable must be applied to an article of manufacture. By far the vast majority of designs relate to articles of manufacture that also have a functional purpose. See *Ashley* v. *Weeks Newman*, 220 F. 899 (CCA 2); *Boyle* v. *Rousso*, 16 F. 2d 666 (CCA 8); *Franklin Knitting Mills* v. *Gropper Knitting Mills*, 15 F. 2d 375, cert. den., 273 U.S. 61 (CCA 2).

As found by this Court in *Gorham* v. *White*, supra, and quoted later in *Smith* v. *Whitman Saddle*, supra:

> "The law manifestly contemplates that giving certain new and original appearances to a manufactured article may enhance its salable value, and enlarge the demand for it, and may be a meritorious service to the public."

Thus the design must appeal to the purhaser in such a manner as to increase the desire for the article, there-

by increasing its salable value. See *Forestek Plating and Mfg. Co.* v. *Knapp Monarch*, 106 F. 2d 554 (CCA 6). The trade to whom the sale of the patented article in the instant case is directed, buy the article for its unique design without garments as admitted by petitioners in their advertising, (Pet. 20A), and as recognized by the Court below. See also *Franklin Knitting Mills* v. *Gropper Knitting Mills*, supra.

Petitioner's contention that a design, to be patentable must be patentable as a design, rather than the design for an article of manufacture, such as a pants rack, is clearly in contradiction to Title 35 USC 171 of the new Patent Act. In fact, according to Section 171, a design is not patentable unless it is applied to an article of manufacture. The Court below followed this authority.

THE DECISION OF THE FIFTH CIRCUIT COURT OF APPEALS IS NOT IN CONFLICT WITH OTHER CIRCUIT COURT DECISIONS

Petitioners insist that the "approach" of the court below in deciding for the respondent is in conflict with the "approaches" of the Seventh Circuit in the case of *King Ventilating Co.* v. *St. James Ventilating Co.*, et al. 26 F. 2d 357, and the Eighth Circuit in the case of *Hopkins* v. *Waco Products, Inc.*, 205 F. 2d 221. Without admitting that the court below took any different approach than that taken by the various Circuit Courts, Respondent contends that different "approaches" by different Circuit Courts does not constitute a valid reason for granting certiorari. As stated in Supreme Court rule 19 1 (b), it is a conflict in "decisions" between different circuit courts of appeal in the "same matter" which warrants review by certiorari.

As a matter of fact the facts in the *King Ventilating Co.* case supra, are completely different than in the present case. In that case Louie Klima, the patentee, worked for the Queen Cupola Co. prior to 1910 which sold cupolas as illustrated in appendix A. In 1913 Louie Klima became general manager of appellant company, King Ventilating Co., which manufactured a cupola as shown in appendix B. In 1917 Louie Klima filed an application for a patent on a cupola as shown in appendix C.

It is immediately obvious from a cursory examination of these three exhibits that the designs are nearly identical. The only difference in the designs is the slight flare in the base of the patented device which actually does not add any significant design feature to the overall appearance of the cupola shown therein. Invention was never really a major issue in the King Ventilating case, since the patented design was clearly anticipated by the prior art and therefore failed to meet the statutory condition of novelty.

No such facts exist in the present case as petitioners would have this Court believe. As found by the Fifth Circuit Court (Pet. p. 30A):

> "There can be little doubt that the patented design was new and original."

In the Seventh Circuit decision in *Hopkins* v. *Waco Products Inc.*, supra, there is again no conflict with the Fifth Circuit in the present case since the facts in that case were also different.

The patented article was a design for a luggage rack, see appendix D. In the decision the court held that

the single feature distinguishing this luggage rack from the prior art was the wall guard, and both courts below conclusively found, as a matter of fact, that the wall guard was entirely functional in its use as well as its construction.

In the present case Judges Tuttle, Cameron and Jones, after viewing the actual patented article, alongside a life size photographic reproduction of the principal prior art, relied on as anticipation, found (Pet. p. 30A):

> "There can be little doubt that the patented design was new or original. The use of a drum in the construction of trouser hanger was not new, but the design of a drum, small in size proportionate to the overall dimensions, and flowing down into a second cylindrical shaped member with integral tripod legs designed for attractiveness of line and sturdiness of support created an undeniably new appearance."

Notwithstanding the Petitioners' comments to the contrary, the Seventh and Eighth Circuit Courts of Appeal have consistently held with the Fifth Circuit that invention can be present in a combination of all new elements, of some new elements and some old elements, and of all old elements, providing there was invention in the combination and a new result obtained of a patentable nature. See *Pelouse Scale Mfg. Co.* v. *American Cutlery Co.*, 102 F. 916 (CCA 7); *Standard Match Corp.* v. *Bell Machine Co.*, 83 F. 2d 365 (CCA 7); *Glade* v. *Walgreen Co.*, 122 F. 2d 306, cert. den. 314 U.S. 692 (CCA 7); *Boyle* v. *Russo*, 16 F. 2d 666 (CCA 8); *Ottuna Box Carloader Co.* v. *Cristy Box Carloader Co.*, 215 F. 362 (CCA 8); *Smith* v. *Mid-Continent Inv. Co.*, 106 F. 2d 622 (CCA 8).

THIS IS NOT A CASE IN WHICH A COURT OF APPEALS HAS RENDERED A DECISION ON IMPORTANT QUESTIONS OF FEDERAL LAW WHICH MAY NOT HAVE BEEN BUT SHOULD BE SETTLED BY THIS COURT

The petitioners, in a last ditch effort to induce this Court to review this case, suggest that "the nature and significance of the questions herein raised justify the granting of the writ for the purpose of final determination of those issues by this Court." The issues on which the petitioners seek review relate to "novelty" and "invention". These issues have been clearly established in numerous cases decided by this Court.

The statutory requirements for design patentability are (35 USC 171):

(1) Invention

(2) Novelty and originality

(3) Ornamentality

Novelty and invention in designs, and novelty and invention in utility patents are governed by the same statutes, that is:

(1) 35 U.S.C. 102, Conditions for patentability, novelty and loss of right to patent, and

(2) 35 U.S.C. 103, Conditions for patentability, non-obvious subject matter.

Thus in determining patentability for designs, novelty and invention are considered in the same light and based on the same laws as novelty and invention in utility patents. The Fifth Circuit Court of Appeals in finding that "invention" was present in respondent's design followed the law of this Court relating to inventor and positively determined that the statutory test

for patentability (35 U.S.C. 103) had been satisfied in that the differences between the subject matter sought to be patented and the prior art were not obvious at the time the invention was made to one skilled in the art. This statutory test for invention has been applied by this Court in cases dating back to *Hotchkiss* v. *Greenwood*, 52 U.S. 248 (1850).

"Novelty" of Respondent's design was never really challenged by the Petitioners and was actually assented to by the Petitioners in their advertising (Pet. p. 21A) and by the testimony of their witnesses (R. p. 299). The Master also recognized novelty in Respondent's design finding this to be a fact (R. pp. 211, 212).

The petitioners further suggest that since this Court has not rendered a recent opinion on a design patent case, this is reason enough for granting the petition. However, in order for this Court to review a case there must be some issue in question. There are no issues in question here. This is a simple case and the issues of novelty and invention have been clearly decided by the Fifth Circuit Court in accordance with long established principles of law laid down by this Court. It would appear that the petitioners having been called to account for their unscrupulous activities; their unfair competitive practices; their pirating and appropriating of the respondent's design; their statements in national advertising warning the trade to 'BEWARE OF INFERIOR IMMITATIONS', thus putting the buying public on notice not to be fooled into buying the rack from the appellant (respondent) who originated the design." (Pet. p. 26A); and for their statements in advertising "clearly calculated to claim for appellees (petitioners) the research and inventive skill which they now assert did not exist in the true inventor."

(Pet. p. 26A); are now seeking reconsideration of well settled issues of patent law in a desperate effort to persuade this Court to review this case.

Since this Court has clearly established the law on novelty and invention which the Fifth Circuit followed, and since this Court has clearly established the test for ornamentality (see *Gorham* v. *White*, supra) which the Fifth Circuit followed, there is not here present an important question of Federal law which remains to be settled by this Court.

CONCLUSIONS

Since this is a suit between private parties resulting from patent infringement;

Since the court below was in the same position as the Master at trial to evaluate the exhibits;

Since the court below followed the law of the Supreme Court in resolving every issue in this case;

Since the decision of the court below is not in conflict with the decisions of other circuits on similar issues;

Since the court below did not decide an important question of Federal law which has not been settled by this Court;

Certiorari should be denied.

Respectfully submitted,

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